IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 781.

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONSE OF PETITIONERS TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT.

The Memorandum of Respondent Solien In Opposition argues that this case does not meet the criteria established by Rule 20 of this Court for a writ of certiorari before

judgment. The reasons advanced to support this contention, however, contain serious error:

1. The instant petition is premised on the frequency with which this significant matter has been presented to this Court,[1] and this Court's resultant familiarity with the underlying considerations (Petition, pp. 9-11). In addition, the question here presented is one of paramount public importance as evidenced by the grant of the petitions for writ of certiorari in *The Los Angeles Herald-Examiner, et al.* v. *Kennedy*, ... U. S. ....., 75 LRRM 2379, and *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U. S. 655, and the brief that has been filed in this case by the Chamber of Commerce of the United States as *amicus curiae*. In these circumstances, contrary to the assertion of the Memorandum In Opposition (p. 2), the standards of Rule 20 have been fully met.

2. This Court's decision in *The Los Angeles Herald-Examiner*—granting the petition for writ of certiorari, vacating the judgment of the court of appeals which had denied the charging parties there involved intervention and appellate rights in a 10(l) proceeding, and directing the court of appeals to dismiss the case as moot on the basis of *Sears*—underscores, rather than denigrates, the need for the Court to grant the instant petition. For that decision once more cogently illustrates how resolution of the critical questions here involved can be frustrated by an intervening Board decision, a fate likely to befall the present case, notwithstanding the considerable diligence

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1. Within the past two years, this Court has been requested to determine the status of charging parties in proceedings under Section 10(1) of the National Labor Relations Act in *San Francisco-Oakland Newspaper Guild, et al.* v. *Kennedy*, 393 U. S. 936; *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U. S. 655; *Terminal Freight Cooperative Association, et al.* v. *Samoff*, ... U. S. ....., 90 S. Ct. 2171; *The Los Angeles Herald-Examiner, et al.* v. *Kennedy*, ... U. S. ....., 75 LRRM 2379; as well as in the instant case.

of Petitioner (Petition, note 7), if the present petition is not granted. In fact, the likelihood of such a development is urged by the Memorandum In Opposition (p. 3) as the basis for finding that this case "is not an appropriate one in which to review the issue which petitioners raise." Yet, if this case does not constitute an appropriate vehicle, the important issues of this case will *never* be in an adequate posture for resolution by this Court. It is precisely because of this perpetual barrier to final resolution of such issues, as demonstrated again in *The Los Angeles Herald-Examiner*, that, contrary to the assertion of the Memorandum In Opposition (pp. 2-3), there continues to exist compelling reason, as contemplated by Rule 20, to deviate from normal appellate processes.

3. The Memorandum In Opposition (p. 3) is also in error when it alleges that the stipulation approved by the district court "effectively stops the Union's alleged secondary activity pending the completion of the main Board unfair labor practice proceeding." Indeed, it is the lack of adequate protection which is the *raison d'etre* of this case. Petitioners seek to be recognized as "parties," or to be permitted to intervene in the 10(l) proceeding, solely so that they can obtain a remedy which, in fact, "effectively stops" the Union's unlawful conduct, *viz.*, a statutorily-specified injunction rather than the informal, incomplete, non-self-enforcing stipulation sanction by the district court. See Petition, pp. 7-9; Appendices to Petition H and I.

4. Finally, the Memorandum in Opposition (p. 3) is incorrect in its assertion that the underlying Board case "is approaching completion . . ." While it is true that the proposed Union-Regional Director unilateral settlement of that case has now been submitted to the General Counsel for approval, that agreement does not become final until subsequently approved by the Board itself. The General Counsel acts only in an *advisory* capacity where, as here, a

formal settlement of the unfair labor practice case is involved. 29 C. F. R. Sec. 101.9(b). Moreover, at the present juncture of the main Board proceeding, the General Counsel has not even ruled on Petitioner's substantial objections to the proffered settlement[2] nor determined whether he will recommend its approval by the Board.[3]

Respectfully submitted,

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2. The Petitioners' opposition is based principally on (1) the failure to provide adequate information upon which to judge whether all substantive violations have been remedied; (2) the failure to afford any opportunity to Petitioners to participate in the negotiation and drafting of the proposed settlement; and (3) the omission in the settlement of findings of fact such as are required by Section 10(c) of the Act and without which it is impossible to determine whether any resumption of the Union's picketing would violate the presumed proscriptions of the settlement. See Petition, pp. 7-9.

3. The General Counsel now has pending before him, prerequisite to his determination of whether to grant such approval, a request by Petitioners for leave to file supplemental objections to the proposed settlement and to argue orally in support of their position. It is not known when a ruling will be made on this request or a date set for oral argument.